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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1980

No. .....

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

—against—

WILLIAM R. PHILLIPS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM M. KUNSTLER
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

C. VERNON MASON
c/o National Conference of Black Lawyers
250 West 57th Street
New York, New York 10107
(212) 586-5120
Attorneys for Respondent

WILLIAM M. KUNSTLER
Of Counsel

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Respondent, William R. Phillips, by his undersigned counsel, pursuant to Rule 22 of the Rules of this Court, respectfully opposes the Petition for a Writ of Certiorari submitted by the New York County District Attorney on behalf of petitioner, Harold J. Smith, Superintendent, Attica Correctional Facility, to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Counter-Statement

Although respondent has no serious disagreement with petitioner's preliminary material, there are several significant omitted facts which, in counsel's opinion, may merit consideration by this Honorable Court. They are as follows:

1. John J. Justy, the detective who allegedly saw respondent during his 1971 televised Knapp Commission testimony and believed that he fit the 1968 composite sketch of the Smith-Stango murderer, was the best friend of a New York City police officer, who had committed suicide prior thereto under the mistaken belief that he had been implicated before the Commission by respondent.

2. Respondent's undercover work for the Knapp Commission had resulted in six federal and six New York County indictments naming a total of 17 New York City police officers and 14 other persons, most of whom were organized crime members. According to the affidavit of Michael F. Armstrong, the Knapp Commission's chief counsel, "[M]any more indictments were anticipated as a result of Mr. Phillips' work, but his own indictment on March 20, 1972, on charges of murder and attempted murder, aborted most of these efforts."

3. Some of the so-called new evidence utilized against respondent at his second trial consisted of a tape recording of his statement to Mr. Armstrong, for which he had, again according to Mr. Armstrong's affidavit, received "full and complete transactional immunity . . ." *

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* In conditionally granting respondent's Petition for a Writ of Habeas Corpus, the District Court did not address itself to this ground and that set forth in paragraph (g) *infra*, both of which were raised by respondent, "since this Court finds, with

[Footnote continued on following page]

4(a). The application of Juror John Dana Smith for a position with the New York County District Attorney's office was initially hand-delivered and ultimately mailed thereto by a New York County Supreme Court officer, a friend of Mr. Smith, shortly after respondent's second trial began.

(b). During the said trial, another New York County Supreme Court officer obtained the name of the Assistant District Attorney responsible for reviewing Smith's application and relayed said information to the latter with a recommendation that he call said Assistant District Attorney.

(c). While respondent's trial was in progress, the New York County Supreme Court officers referred to in (a) and (b) above made inquiries, at Smith's request, to several Assistant Attorneys about the position for which he had applied.

(d). The two Assistant District Attorneys prosecuting respondent's case were notified about Juror Smith's application a week before the termination of respondent's second trial and decided not to inform the trial court or defense of that fact and one said prosecutor stated to another Assistant District Attorney that "I don't want to hear about that anymore."

(e). Juror Smith, who, during respondent's trial, had heard nothing from anyone in the District Attorney's office about his pending application, attempted to contact the Assistant District Attorney

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respect to his first contention, that the fundamental constitutional requirements of a trial before an impartial jury and of due process were denied to the petitioner upon the undisputed fact that a juror filed an application for a job in the prosecutor's office after being selected to serve on the trial jury in this case, which application was still pending at the time the jury rendered its verdict." Appendix to Petition (hereinafter "App.") at 14a-15a.

referred to in (b) above the day after the jury's verdict was rendered. When he failed to establish such contact, he asked a former employer with several contacts in the District Attorney's office to do so. The latter thereupon called the Assistant District Attorney in question and informed her, *inter alia*, that Smith had served on respondent's jury, a fact that she had learned during the trial.

(f). At a post-trial hearing ordered by the trial judge after the disclosure of Smith's employment application, the prosecution revealed for the first time that the juror had had drug and family problems in 1970 or 1971, had been a patient in a Connecticut mental hospital, and had had problems with the police in both New York City and Australia.

(g). Early in respondent's second trial, the Assistant District Attorneys in charge of the prosecution also learned that another sworn juror, one Lawrence Bethel, had been arrested on a narcotics charge prior to the commencement of the trial and had agreed to cooperate with an adjunct of the District Attorney's office in exchange for a dismissal of the said charges, but did not disclose said information until just prior to the beginning of the jury's deliberations. Following such disclosure and an *in camera* hearing, the parties consented to Mr. Bethel's discharge, and his replacement by the first of four available alternates.

Reasons for Denying the Writ

Petitioner claims that the decision of the court below "expands federal habeas corpus review of state convictions to permit federal courts to exercise supervisory power over the conduct of state prosecutors by nullifying convictions even though the challenged conduct did not affect the outcome of the trial." Petition at p. 10. He further

contends that said decision represents "a gross departure from [accepted constitutional principles and statutory requirements] because it directly conflicts with no fewer than three decisions of this Court—*Remmer* v. *United States*, 347 U.S. 227 (1954); *United States* v. *Agurs*, 427 U.S. 97 (1976); and *Donnelly* v. *De Christoforo*, 416 U.S. 637 (1974)—and directly contravenes the statutory requirements governing habeas corpus. 28 U.S.C. 2254." *Id.*

Respondent has no basic fault to find with the appropriateness, in the usual situation, of a post-verdict inquiry in any case where the impartiality of a juror is brought into question after the conclusion of a criminal trial. However, we are here confronted with a state of facts which are uniquely *sui generis*. We are not here concerned with the effect of outside influences purportedly exerted upon a trial juror as in *Remmer*, *supra*, but with the juror's own unilateral conduct in seeking employment, *after* being sworn, with the prosecutor's office, and in making persistent inquiry, often through others, as to the status of his application during the trial and immediately subsequent to verdict. It is highly doubtful whether such a set of extraordinary circumstances have ever occurred in any other American criminal trial and, indeed, the literature reveals no such instance.*

Accordingly, it is impossible, as Circuit Judge Oakes pointed out during oral argument below, to accept at face value the assurances of the juror in question that he was, in fact, impartial. Indeed, as Judge Oakes further remarked, it was highly improbable that such a juror, whose own serious misconduct was at issue, would ever admit to bias or prejudice when confronted with the

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* Even the trial judge characterized the conduct of Juror Smith as "unprecedented imprudence" and that of the prosecution as "unique misjudgment." App. at 57a.

indisputable evidence of his application for employment by the prosecutor. Under these circumstances, the juror's protestations of impartiality, no matter how vehement or sustained, simply cannot be accepted as proof beyond a reasonable doubt of his freedom from bias or prejudice. As the majority below put it:

> "Given the human propensity, often subconscious, for self-justification, as well as the 'psychological impact' of requiring an individual to state before others whether he was fair and impartial, *Irwin* v. *Dowd*, 366 U.S. 717, 728 (1961), it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact 'impartial.' Indeed, following a seven week trial, any determination of something as amorphous as the feelings of a juror who has applied to the prosecutor for a job may be suspect." App. at 7a.

The best that can be said of this issue is, as the District Court observed, "that the record of this matter does not support [respondent's] claim that juror Smith was *actually* partial to the prosecution's case because he was seeking employment." App. at 25a. (emphasis in original).

Moreover, Juror Smith's partiality, assuming it, for the sake of argument, to be deep and pervasive, must, human nature being what it is, be regarded as being incapable of proof, unless he was willing to implicate himself, both criminally and civilly. This was not the case in *Remmer*, *supra* [FBI agent sent into jury room without defendant's knowledge or consent to investigate rumor that unnamed person had informed juror that he could profit by a verdict in favor of defendant]; or in *United States* v. *Johns*, 615 F.2d 672 (5th Cir. 1980) [alternate juror learned and advised foreman of the murder of an unidentified trial witness]; *United States*

v. *Gross*, 614 F.2d 365 (3d Cir. 1980), *cert. den.*, — U.S. —, 100 S. Ct. 3019 (1980) [some jurors' annoyance at a marshal's expressed romantic interest in one of their number]; or *Sullivan* v. *Fogg*, 613 F.2d 465 (2d Cir. 1980) [post-trial revelation that one juror had complained to the prosecutor throughout the trial of harassment by "voices" and "vibrations"]. Here, Juror Smith instigated the employment application shortly after trial testimony began, evidenced a more than lively interest in its progress throughout the trial, and wasted no time in pursuing it vigorously as soon as the verdicts were rendered.

There are a multitude of appropriate and applicable legal theories which support the decision below. Whether it is grounded on the District Court's "implied bias" concept which was based, in part, on this Court's ruling in *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the due process disclosure requirements of such cases as *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *United States* v. *Agurs*, 427 U.S. 97 (1976), the "appearance of justice" standard, *Rose* v. *Mitchell*, 443 U.S. 545 (1979), or the so-called "objective prophylactic" rule referred to by both the District Court and the Court of Appeals, App. at 7a, 22a and 29a, it is clear that what the District Court referred to as an "inexcusable abridgement of the [respondent's] Sixth Amendment right" to a demonstrably fair and impartial jury entitles the latter, at the very least, to a new trial.

Finally, the court below very carefully restricted its decision to the unique fact pattern before it. As District Judge Nickerson, writing for the majority, put it:

> No doubt there will be cases in which the prosecution receives innocuous information regarding a juror. While the prudent prosecutor will no doubt err on the side of disclosure, we do not suggest that a new trial will be required in every case. *We merely hold that the prosecutor may not keep*

silent when he knows that a juror has applied to become his employee. App. at 10a (emphasis added).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.*

Respectfully submitted,

WILLIAM M. KUNSTLER
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

C. VERNON MASON
c/o National Conference of Black Lawyers
250 West 57th Street
New York, New York 10107
(212) 586-5120
Attorneys for Respondent

WILLIAM M. KUNSTLER
Of Counsel

Dated: New York, New York
January 16, 1981

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* In view of the fact that respondent filed his Petiiton for a Writ of Habeas Corpus with the District Court some 21 months ago, received his conditional grant of the Writ ten months ago, which said order was affirmed by the Court of Appeals more than three months ago and rehearing denied more than one month ago, it is respectfully requested that this Court decide the within Petition expeditiously as every passing day adds intolerably to his more than six years of unlawful incarceration.